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To the Federal Council

2018 Annual Report of the Competition Commission

(in accordance with Article 49 paragraph 2 Cartel Act)

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1 Foreword from the President

The reality of the competition and of the internal market is decisively shaped by the practices of the competition authorities and the courts. The decisions of the Competition Commission are the result of comprehensive deliberations involving complex dossiers, detailed consultations with the parties and intensive discussion within the Commission. In 2018, the Competition Commission concluded four investigations in different markets and conducted an in-depth examination of three mergers of media companies. Most of these decisions have taken full legal effect.

Special emphasis in 2018 should be placed on the “Engadin I” decision, which relates to a large number of bid rigging agreements in the Lower Engadin, the detailed examination of the three company mergers, AZ Medien / NZZ, Tamedia / Goldbach and Tamedia / Basler Zeitung, the decision on price-fixing agreements and customer sharing by Husqvarna and Bucher in connection with Aspen engine fuel, the decision on the unlawful export ban on wheeled suitcases imposed by RIMOWA, and the decision in the KTB-Werke case on unlawful practices in the gravel and concrete industry in the Bern area. In relation to the three mergers in the media industry, the Competition Commission’s statutory role must be highlighted: it has to establish whether mergers create or strengthen a dominant position that is capable of eliminating effective competition. The Competition Commission has no direct mandate to ensure diversity in the media: the legislature has specified that the Commission operates within a framework determined by competition law, not by media policy.

The “Engadin I” decision, issued in April 2018, has had a serious impact. One of ten investigations into bid rigging in the canton of Graubünden, it involved a large number of arranged procurements in the Lower Engadin. Companies agreed with each other on which firm should win which bid at which price. In some cases, these agreements formed part of a system that operated over many years, in other cases they were entered into for individual construction projects. The value of the public and private procurements involved in the Engadin was well over CHF 100 million. The economic damage caused by bid rigging is severe. This is another reason why the Competition Commission has made a priority of combating bid rigging in the past ten years.

Efforts go beyond applying the Cartel Act and the Internal Market Act in individual cases. Also important were the many information and awareness-raising events, including those with and for federal and cantonal procurement offices: where people are aware of and can recognise bid rigging, they can often prevent it altogether. Also worth highlighting is the development of a statistical tool that recognises irregularities in the way that suppliers make offers. This tool allows the competition authorities pursue an active policy in uncovering cartels, thus increasing the deterrent effect of the Cartel Act. The screening tool developed by the Competition Commission Secretariat has not only been used in Switzerland, but also aroused a response and interest at an international level.

Functioning competition is an important factor in economic well-being. The diligent application of the Cartel Act and the Internal Market Act is therefore in the interests of a strong and healthy Swiss national economy. In the social and political debate, the current law and its application is sometimes judged to be too strict, and at other times too lax. The relatively high number of political proposals is an indication of this. The protection of effective competition is a central pillar of a sustainable economic policy, and the Competition Commission safeguards this area of responsibility at an institutional level. The Commission acts in the interests of competition and to this end also participates in the public discourse on matters relevant to competition. Its main task, however, lies in the applying the current law. This annual report also bears testimony to the complexity of the work required to achieve this.

Prof. Dr. Andreas Heinemann
President of the Competition Commission

2 The Most Important Decisions in 2018

2.1 Decisions of the Competition Commission

On 29 January 2018, the Competition Commission (ComCo) concluded its investigation into Husqvarna and Bucher, which it had opened on 31 May 2016 in response to a voluntary report from Husqvarna. The investigation showed that from 1998 until the start of 2016 there was an unlawful horizontal agreement between Husqvarna and Bucher relating to price-fixing and customer sharing in connection with the sale of **engine fuel of the Aspen brand**. In amicable settlements with the competition authorities, both companies undertook to refrain from entering into such agreements in future. Husqvarna was exempted from a sanction because it had notified the competition authorities of the agreement and thus facilitated the opening of the investigation. Bucher's cooperation led to a substantial reduction in the fine to around CHF 610,000. The decision has taken full legal effect.

On 9 April 2018, ComCo concluded the investigation into the German company **RIMOWA GmbH** with an amicable settlement and a fine, both of which are legally binding. The investigation showed that in its dealership contract with its German sales partners for period from 25 January 2012 to 13 November 2013, RIMOWA had unlawfully prohibited the export of its products to Switzerland. The company was therefore fined CHF 134,943. In an amicable settlement with the competition authorities, RIMOWA undertook not to enter into similar agreements in future. The company's cooperative conduct led to a reduced sanction.

On 26 March 2018, ComCo issued its "**Engadin I**" decision, imposing sanctions on several construction companies for numerous bid rigging agreements in the Lower Engadin; the fines amounted to around CHF 7.5 million. ComCo thereby concluded the eighth of ten investigations into bid rigging in the canton of Graubünden (see Section 1). In its decision, ComCo held that construction companies in various cartels reached agreements on what is conservatively estimated at over 400 contract bids for structural and civil engineering projects. The value of the procurements affected by these agreements is well over CHF 100 million. The construction companies agreed over a period of many years which of them should be awarded the contract. In most cases, agreement was also reached on the tendered price at which the designated "winner" should carry out the construction project for the procurement office. The Graubünden construction companies ran some of the cartels systematically over a number of years. These agreements were in some cases reached at preliminary meetings organised by the Graubünden Builders' Federation. The cartels focused on invitations to tender issued by the Canton of Graubünden and by communes and private individuals in the Lower Engadin. The contract values for the agreed construction work range from a few tens of thousands to several million francs. As the Graubünden Builders' Federation organised some of the cartels, ComCo ordered the Federation to pay part of the procedural fees.

ComCo was called upon to make an in-depth assessment of three company mergers in the media industry: **AZ Medien/NZZ**, **Tamedia/Goldbach** and **Tamedia/Basler Zeitung**. Following a detailed examination of the **AZ Medien/NZZ** merger, there were indications that the foundation of the joint venture by AZ media and NZZ could lead to or strengthen a dominant position in the markets for readers in the Solothurn and Aargau areas and in the magazine advertising market for building services engineering. There were also indications of the establishment or strengthening of a joint dominant position with the Basler Zeitung in the market for readers of daily newspapers in the Basel area, and with the Tamedia Group and the Ringier Group in the market for readers of Sunday newspapers. However, it was not anticipated that establishing the joint venture will allow the companies involved to eliminate effective competition in the markets concerned, as other strong competitors remain and the merger will not lead to any relevant change in the competitive situation in the market for Sunday newspapers. The detailed examination of **Tamedia's** takeover of **Goldbach** revealed that the planned merger would not lead to significant changes in market conditions. In addition, it was not anticipated that the

portfolio effects caused by the merger would lead to an elimination of effective competition. In the detailed examination of the **Tamedia/Basler Zeitung** merger there were also indications that the takeover of the Basler Zeitung could lead to a dominant position together with the NZZ/AZ Group and the Ringier Group being established or strengthened in the market for readers of daily newspapers in the Basel area and in various markets for classified advertisements both in the Basel area and in German-speaking Switzerland. ComCo however concluded that market conditions will hardly change as a result of the change in the owner of the Basler Zeitung and the takeover does not lead to an elimination of effective competition. The assessment reached in the detailed examination meant that ComCo gave the go ahead to all three mergers in August and October of 2018. In this connection, it should be stressed that ComCo is not pursuing any form of media policy. It is not permitted to take media policy issues, such as diversity in the media, into account in its assessment of merger plans.

In a decision dated 10 December 2018, ComCo concluded the **KTB Werke** investigation. This originated from the investigation opened on 12 January 2015 into companies in the building materials and landfill industry in the canton of Bern (see Section 3.1.2). ComCo issued the parties with its ruling at the start of 2019 and then informed the public in a press release. For several years, the Kästli and Alluvia Groups had fixed prices and price elements in the concrete- and gravel industry and shared business in and around the city of Bern. Between them they restricted competition to a considerable extent and abused their jointly held dominant position in the area in and around the city of Bern in order to prevent competitors from entering the market. The companies have appealed to Federal Administrative Court against the decision.

2.2 Court judgments

On 3 May 2018, the Federal Administrative Court decided not to consider the appeal filed by **Ticketcorner** against the prohibition of its merger with **Starticket**. The court justified its decision essentially on the grounds that Tamedia (as Starticket's parent company) had chosen not to appeal and had announced that it would develop Starticket on its own. As a result, Ticketcorner's appeal was not admissible because the company lacked a (current and practical) legitimate interest in having the judgment quashed or amended. The decision of the Federal Administrative Court has been challenged. In relation to the question of whether in cases involving the prohibition of a merger both parties to the merger must contest the ruling together, the Federal Administrative Court regarded two points of view as relevant: firstly if Ticketcorner were able to artificially prolong the current uncertain effectiveness of the merger agreement against the interests of Starticket, that would allow a situation in which only one of the parties to the merger could bring an appeal against the prohibition order. Ticketcorner could also unilaterally delay the creation of legal certainty and in particular a legally-enforceable decision with regard to its position in the market. Secondly the Federal Administrative Court argues that Ticketcorner and Tamedia form a community of interests with regard to the merger. As both companies were required to report the merger, then – based on the community of interests which required their solidarity – they should also have filed a joint appeal against the merger.

With its judgment of 18 May 2018 in the case of **Altimum SA / Mountaineering equipment**, the Federal Supreme Court partially upheld the appeal filed by the Federal Department of Economic Affairs, Education and Research (EAER) and ComCo against the judgment of the Federal Administrative Court dated 17 December 2015 and confirmed the ComCo ruling of 20 August 2012 to the effect that Altimum SA, by dictating minimum sale prices for mountaineering equipment to its retailers, had entered into unlawful vertical price-fixing agreements. The Federal Supreme Court explained inter alia that retailers are parties to an unlawful agreement if they enter into a sales contract with a manufacturer on condition that they comply with minimum retail prices even if they face not being supplied with goods if they do not. It is sufficient that the agreement aims to achieve a restraint of competition; an evaluation of its effects, in particular the extent to which the agreement is followed, is not required. On this issue, the

Federal Supreme Court confirmed the relevance of its GABA/Elmex decision. According to the Federal Supreme Court, one possible justification for fixing minimum prices would be to enable retailers to compete through the quality of the advice they give to customers and thus to counteract the 'freeloader problem' (getting advice in a specialist shop – then buying the product from a cheaper supplier). However, this justification had not been argued here. For procedural reasons the Federal Supreme Court did not impose any sanction on Altimum SA.

In its decision of 16 December 2011 on the case relating **road construction and civil engineering in the canton of Aargau**, ComCo took action against bid rigging. Fourteen construction companies operating in the canton of Aargau were fined around CHF 4 million for entering into unlawful bid rigging arrangements between 2006 and 2009 on prices and the allocation of markets. Around 100 public and private construction projects were affected between 2006 and 2009 by the unlawful bids. Four companies contested ComCo's decision. The appeal was pending before the Federal Administrative Court for around six and a half years. On 25 May 2018, the Federal Administrative Court largely upheld the decision of ComCo against the construction companies from the canton of Aargau. The Federal Administrative Court confirmed the legal assessment of the conduct under investigation as hard horizontal price-fixing agreements and agreements to allocate markets according to business partners in contravention of the Cartel Act. In its judgments, the Federal Administrative Court clarified some important issues. These include the minimum legal requirements on the evidence that must lead and the appraisal of evidence in competition law investigations, and dealing with information from companies that report their own unlawful conduct and cooperate with the competition authorities. Furthermore, the Federal Administrative Court clarified issues relating to alleged infringements of procedural rights by the competition authorities and confirmed that violations of competition law (in some cases with no financial gain) can lead to sanctions as well as the legality of the method used by ComCo for fixing fines in specific cases. Because the court's assessment of the facts differed to some extent from that of ComCo, the court reduced the sanctions. One construction company has appealed the decision of the Federal Administrative Court to the Federal Supreme Court.

On 22 November 2016, ComCo filed three appeals against the cantonal Commercial Enterprises Act (**Legge sulle imprese artigianali, LIA**) in the Cantonal Administrative Court in Ticino. The LIA provided for the mandatory, costly and time-consuming registration of skilled trades businesses. More than ten documents with supporting evidence had to be submitted for each registration. In particular, the LIA prevented access to the market in Ticino for businesses from other cantons. The Cantonal Administrative Court upheld ComCo's appeals in its decisions dated 27 February 2018. It regarded the requirements of the LIA as restricting free access to the market and as a breach of the Internal Market Act (IMA). The Federal Supreme Court dismissed the subsequent appeals from certain Ticino trade associations and skilled trades companies in decisions dated 11 October 2018 on the grounds that they had no title to appeal, with the result that the judgments of the Cantonal Administrative Court became legally binding.

The Federal Administrative Court handed down further decisions in the case relating to **road construction and civil engineering in the canton of Aargau**. On the conclusion on 16 December 2011 of the main proceedings relating to bid rigging and the publication of the decision on sanctions, procurement offices from the canton of Aargau filed two **requests to inspect** the unredacted Competition Commission ruling and related files. This procedure was initially adjourned, and following the adjournment ComCo issued its decision in rulings dated 11 December 2017. It approved the request to inspect in some cases and planned to allow the applicants to inspect the documents and be given information to a limited extent. Certain parties appealed against the inspection rulings. On 23 October 2018, the Federal Administrative Court issued three judgments upholding the appeals. The divergent decision by the Federal Administrative Court was due to the fact that it interpreted Art. 19 para. 1 let. a of the Data Protection

Act (FADP) more restrictively than ComCo. Under Art. 19 para. 1 let. a FADP, the data requested may only be disclosed if they are indispensable for the applicant to fulfil its statutory duties. The Federal Administrative Court takes the view that indispensability of this kind can only be affirmed firstly if a legally binding decision on sanctions has been issued, and secondly if a related breach of competition law has been determined. ComCo in contrast took the view that it was not necessary to wait for the decision to become legally binding. In consultation with ComCo, the EAER has filed appeals against two of the three Federal Administrative Court judgments with the Federal Supreme Court. The judgment of the Federal Supreme Court will determine how various inspection requests currently pending before ComCo will be dealt with.

Lastly **decisions on the publication of Competition Commission rulings** were issued in various cases; in most cases, publication was judged to be lawful (see Sections 3.3.2, 3.3.4 and 3.4.4).

3 Activities in Individual Sectors

3.1 Construction

3.1.1 Bid rigging

Since 2017, ComCo has issued various decisions about **bid rigging in the canton of Graubünden**. The decisions originate from the investigation opened on 30 October 2012 into construction services in the Lower Engadin involving various companies operating in the construction and civil engineering industries, roads and surfacing work and related upstream markets. In April 2013, the Secretariat extended this investigation to cover the entire canton of Graubünden and additional companies and again in November 2015 to include further companies. In November 2015, the proceedings were divided into ten investigations for reasons of procedural economy.

ComCo concluded one investigation with a decision dated 10 July 2017, which has now taken full legal effect. It found that that construction and civil engineering companies in the **Münstertal** (GR) had rigged more than a hundred bidding processes between 2004 and 2012 (see the 2017 annual report). ComCo dealt with the request from the Canton of Graubünden to inspect the unredacted decision and related files on 17 September 2018 in a separate ruling, which was challenged and is now pending before the Federal Administrative Court. ComCo issued **six further decisions** on bid rigging in the construction and civil engineering industry in the canton of Graubünden on 2 October 2017. These bid rigging agreements related to individual procurement contracts in the Engadin. Two of these decisions are legally binding, while the remaining four are pending before the Federal Administrative Court. In 2018, ComCo concluded the eighth of the ten investigations with its decision in the **Engadin I** case (see Section 2.1). Three companies have appealed the decision to the Federal Administrative Court.

The final two decisions are expected in summer 2019. One of these investigations relates to construction and civil engineering and is smaller in scope, similar to those in the decisions of 2 October 2017. The other, larger investigation relates to **road construction** throughout the canton of Graubünden. The conclusion of this investigation has been delayed, as an interim ruling was pending for two years from May 2016 before the Federal Administrative Court that involved the legal issue of whether a former employee of one of the parties to the proceedings can be interviewed as a witness or not. Following the decision of the Federal Administrative Court in September 2018, the final investigations could be carried out.

ComCo decided on 8 July 2016 that in connection with several hundred tendering procedures between 2002 and 2009, eight road construction and civil engineering companies in the districts of **See-Gaster (SG) and March and Höfe (SZ)** had unlawfully discussed bids and decided who was to be awarded the contract. Some of these companies have challenged

ComCo's decision in the Federal Administrative Court, where it has been pending ever since. Some companies have also taken the view that ComCo's decision should not be published. One of the parties has filed an appeal in the Federal Administrative Court against ComCo's two publication rulings dated 30 October 2017, which led to several interim decisions from the Federal Administrative Court and Federal Supreme Court that essentially supported ComCo's points of view. It has been possible to publish the decision provisionally in the meantime. The main decision in this case is still outstanding.

In the case involving **road construction and civil engineering in the canton of Aargau**, four parties have challenged ComCo's decision of 16 December 2011. The Federal Administrative Court confirmed ComCo's decision against the building contractors from the canton of Aargau for the most part (see Section 2.1). In the same case, ComCo decided on 11 December 2017 on two **requests** from procurement offices from the canton of Aargau **to inspect** the unredacted ComCo ruling dated 16 December 2011 and related files. ComCo granted the procurement offices restricted access. The corresponding decisions however were challenged by the parties to the proceedings before the Federal Administrative Court. The Federal Administrative Court allowed the appeals in October 2018, as a result of which the EAER in consultation with ComCo has referred two of the three decisions to the Federal Supreme Court (see Section 2.1).

The Secretariat has conducted **awareness campaigns** in five cantonal administrations in French-speaking Switzerland on bid rigging and on the law of the internal market (see Section 5.2).

3.1.2 Building materials and landfills

On 12 January 2015, the Secretariat opened an investigation into various companies in the **building materials and landfill industry** in the canton of Bern and carried out searches of houses and business premises. It is suspected that the companies concerned may have entered into price, quantity and territorial agreements. There is also evidence that the companies concerned hold and have abused a dominant position, in particular by refusing to do business with third companies, by discriminating against commercial partners and by concluding agreements on the condition that additional services were accepted. On 19 May 2015, the investigation into the allegation of price, quantity and territorial agreements was extended to include an additional company. The investigation aims to establish whether there are any unlawful restraints of competition present.

The investigation into the **building materials and landfill industry** was divided into two cases in November 2016 for reasons of procedural economy: the **KTB-Werke** investigation and the **Bern building materials and landfills (KAGA)** investigation. The subject of the KTB-Werke case was price and territorial agreements in the Bern area and the abuse of a collectively held dominant position, in which the companies with the dominant position prevented third parties from entering the market by jointly applying special conditions. The **investigations** in both cases were largely concluded in 2017. In a decision dated 10 December 2018, ComCo concluded the smaller KTB-Werke case (see Section 2.1).

3.1.3 Other sectors

In February 2017, the Secretariat opened a **preliminary investigation** into the Swiss Society of Engineers and Architects (SIA) and its members, and notified the SIA in September 2017 of the conclusions of its preliminary competition law assessment. The investigation focuses on the calculation formulae for architects' and engineers' fees, the terms of reference for calculating fees in the case of contracts awarded through competitions, and the charter on "Fair fees for competent services". In 2018, the Secretariat and the SIA discussed the Secretariat's proposals for changes in the SIA's and its members' practices that are dubious in competition law terms. Based on these proposals, the SIA has worked out a transitional solution for some

regulations on services and fees, while it has revoked others. The SIA is also working on a longer-term solution.

3.2 Services

3.2.1 Financial services

In the financial services sector, progress was made with the ongoing investigations (IBOR proceedings, Forex, precious metals and leasing), with the result that decisions can be expected in 2019. In the investigation into currency exchange rates ("Forex") the Secretariat and a member of the Presidency issued a ruling on the provision of information relating to the disclosure of turnover figures for the sanctions calculation. The appeal filed against this ruling was dismissed.

The latest ComCo investigation into several Swiss financial institutions involves a suspected **boycott of international providers of mobile payment solutions** such as Apple Pay and Samsung Pay. The investigation aims to clarify whether several Swiss financial institutions have entered into an agreement not to support mobile payment solutions from international providers such as Apple Pay and Samsung Pay. It is suspected that the Swiss financial institutions have agreed not to allow their credit cards to be used with Apple Pay and Samsung Pay in order that preference be given to the Swiss TWINT solution.

The Secretariat reached an agreement with **Apple** in a preliminary investigation on a pro-competitive **TWINT** solution and then concluded the proceedings against Apple. The preliminary investigation related to Apple Pay, a mobile payment solution used by Apple devices. These devices and the app are configured so that Apple Pay starts automatically and payment can be made using Apple Pay if the Apple device is held close to a payment terminal. TWINT payments can be made at payment terminals if customers use their mobile phones to scan a QR code displayed on the payment terminal. During this process there has been a risk that Apple Pay will automatically start up and interrupt the payment process using the TWINT app. Apple has given an undertaking to the Secretariat that it will immediately provide the technical details required for TWINT to stop Apple Pay from starting automatically during the payment process using the TWINT app.

3.2.2 Healthcare

Hirslanden AG and the Klinik Stephanshorn requested that precautionary measures be taken in relation to the Canton of St. Gallen's hospital planning for the duration of an investigation relating to the alleged abuse of a dominant position. In particular, they requested that the cantonal government in the Canton of St. Gallen should as a precautionary measure be required to place the Klinik Stephanshorn on the 2017 list of hospitals offering specific types of acute care services. The request was rejected, as the requirements were not met for ordering precautionary measures – in particular because it was not clear what decision would ultimately be made, nor that the requesting parties were actually suffering any disadvantage that could not be easily rectified.

The **Claraspital Basel** and the **University Hospital Basel** are establishing a centre for abdominal medicine, known as 'Clarunis', providing medical services in the fields of abdominal surgery and gastroenterology. They plan to jointly employ the highly specialised medical staff that are required for these operations and treatments. With this abdominal medicine centre, the two hospitals aim to jointly provide medical services in the areas of basic, specialised and highly specialised medical care, thus making a joint contribution towards university teaching and research. The hospitals involved have submitted a notification under the opposition procedure set out in Art. 49a para. 3 let. a Cartel Act. Although patient control in a highly specialised medical sector could potentially have been problematic, the competition authorities decided not to open proceedings, because patient control in the field of highly specialised

abdominal surgery has been carried out as a consequence of the concentration process initiated throughout Switzerland.

Various health insurance companies have submitted their planned **industry agreement** on “**external agents**” under the opposition procedure. In terms of Art. 19 para. 3 of the Health Insurance Oversight Act and Art. 31a of the Insurance Oversight Act, the agreement aims to improve the quality of the advice given and the contracts concluded, to limit the fees paid to external agents to a reasonable level, and to stop cold calling by telephone. The main issue that the report addressed was therefore the extent to which there were reserved provisions under Art. 3 Cartel Act. In addition, the question of the admissibility of the notification was of special importance, as similar agreements are already in force. The requirement that external agents have specific training and the level of fees paid under the Insurance Contracts Act could potentially have been problematic. This has been made clear to the insurers without any proceedings being opened.

Three further cases related to the **market for “Spitex” (care in the community) services** in the cantons of Basel-Stadt, Fribourg and Thurgau, each involving similar issues. Firstly, there is a lack of any public bidding procedure to award such contracts for services to private companies. Secondly, the cases relate to appeals by private companies that feel discriminated against by the communes and cantons. In particular the system of granting subsidies for services from public entities is controversial. This system appears to favour Spitex, which benefits from the subsidies. The competition authorities are currently making a closer examination of the issues raised.

In the course of the year numerous enquiries were received from members of the public relating to health services. Some of these enquiries led to market monitoring procedures that have not yet been concluded.

In addition, the Secretariat participated in around a hundred consultation procedures, for the most part relating to parliamentary proposals on social insurance and healthcare markets. As part of these ‘advocacy’ activities, it submitted numerous opinions to the federal authorities responsible.

With its decision of 2 November 2009 in the **off-list medicines** case, ComCo declared the recommended retail prices that manufacturers had set for medicines that treat erectile dysfunction to be unlawful hard vertical agreements affecting competition and imposed sanctions on the pharmaceutical companies concerned. The appeals filed against this decision were upheld by the Federal Administrative Court. ComCo filed an appeal against this judgment in the Federal Supreme Court. The Federal Supreme Court agreed with ComCo and on 12 February 2015 referred the decision back to the Federal Administrative Court. In its five judgments of 19 December 2017, the Federal Administrative Court held that the published recommended prices had not restricted competition. As they were maximum price-recommendations, they had instead prevented prices from rising to an excessive level. It quashed the sanctions orders against the manufacturers of the potency drugs. The EAER, in consultation with ComCo, filed an appeal against these judgments at the end of January 2018 in Federal Supreme Court.

3.2.3 Liberal professions and other services

In 2018, two investigations were opened with searches of houses and business premises in relation to the liberal professions and liberal professional services. One investigation relates to installation and electricity services in Geneva. In various companies that were the subject of searches, a large number of interviews have already been conducted. At present the data seized are being analysed in order to assess whether the companies involved agreed on prices when bidding for private and public contracts for installation and electricity services.

On 5 March 2018, the competition authorities opened an investigation into the **Oberwallis Driving Instructors’ Association** (FVO) and its active members and conducted searches of

houses and business premises. The investigation focuses on indications that the companies under investigation have entered into pricing arrangements for driving lessons and highway code courses in the Oberwallis. Based on these indications and the documents seized in the searches of houses and premises, an assessment will now be made as to whether the Oberwallis Driving Instructors' Association and its active members actually entered into unlawful agreements affecting competition. ComCo is expected to issue its decision at the beginning of 2019.

The service also dealt with cases relating to lift maintenance, ski schools and taxi services.

3.3 Infrastructure

3.3.1 Telecommunications

ComCo imposed a fine of around CHF 3.6 million on Naxoo on 11 December 2017 in the **Supermédia** investigation, after it was proven that Naxoo held a dominant position in its area of activity, in particular in the city of Geneva in the market for cable connections, and that it had abused this position firstly by imposing unreasonable terms and conditions in agreements for cable connections with house owners and secondly by obstructing potential competitors. Naxoo has appealed against the decision.

Further progress was made in the preliminary investigation in connection with the **broadband networking of business locations (WAN connection)**.

3.3.2 Media

On 29 January 2018, the Federal Supreme Court dismissed the appeal filed by Les éditions des 5 frontières SA against the decision of the Federal Administrative Court of 25 April 2017, which ordered the publication of the substantive decision in the case on **book prices in French-speaking Switzerland (marché du livre en français)** in the DPC/RPW, ComCo's publication organ. Les éditions des 5 frontières SA requested the Federal Supreme Court to order that the passages in the text in the above ruling that mention its premises and its internal organisation as well as the details of the cited contract be redacted.

The investigation opened by ComCo in May 2017 into UPC Switzerland GmbH in response to allegations that it was abusing a dominant position in relation to the broadcasting of **ice hockey on Pay TV** was continued. In the summer of 2016, UPC acquired the broadcasting rights for the top Swiss ice hockey leagues from the Swiss Ice Hockey Federation for five years from season 2017/18. The key question in the investigation is whether UPC is unfairly preventing rival TV platform providers, in particular those not operating via the cable network, from broadcasting ice hockey matches.

ComCo also carried out detailed assessments of three company mergers in the media industry. In the case of the mergers between **AZ Medien/NZZ, Tamedia/Goldbach** and **Tamedia/Basler Zeitung**, ComCo decided on the basis of the detailed examination to give the go-ahead to the mergers (see Sec. 2.1.)

In addition, ComCo assessed the following **company mergers**: in the case involving SDA and Keystone, SDA and Keystone planned to merge to become a Swiss agency providing a comprehensive range of services. In the case of Tamedia/AXA/JV, Tamedia and the Axa Insurance planned to launch a joint venture to trade in used cars online. ComCo gave the green light to both these mergers following a provisional examination.

3.3.3 Energy

The Secretariat continued **two preliminary investigations** in the **gas** sector. In one case, the issue is various practices of a local gas network operator that could lead to different charges

for using the network for the company's own end customers in comparison with the charges paid by those supplied by third parties. The other case involves the refusal of two gas network operators to allow natural gas from third parties to pass through their system. In both preliminary investigations, the aim is to establish whether there is any evidence of unlawful conduct by the network operators in terms of Article 7 Cartel Act.

In the **electricity** sector, both the Secretariat and ComCo were requested on several occasions to provide opinions in office consultation procedures and in legislative consultation proceedings and hearings respectively.

3.3.4 Other sectors

The Federal Administrative Court has still to issue a decision in the appeal proceedings in the case relating to **air freight**. Various parties have appealed to the Federal Administrative Court against the ruling of 2 December 2013, which concluded the air freight investigation and led to sanctions totalling around CHF 11 million being imposed on 11 airlines for entering into horizontal price-fixing agreements. Also in dispute was whether and to what extent the ruling of 2 December 2013 will be published. On 30 October 2017, the Federal Administrative Court partly upheld the nine appeals filed in relation to the extent of publication. After the matter was referred back to ComCo, on 12 November 2018 ComCo ordered a revised version to be published. A further opportunity is available to appeal against this decision.

SwissPost has appealed to the Federal Administrative Court against ComCo's decision of 30 October 2017 in the case on the **business customer pricing system for letter post services**. ComCo had issued the decision on conclusion of the investigation into SwissPost, and imposed a fine of around CHF 22.6 million. The subject of the investigation was SwissPost's pricing systems for business customers in relation to addressed postal deliveries, which it had used in abuse of its dominant position.

In relation to postal services, ComCo had to assess the merger between **TNT Swiss Post and FedEx Express**. TNT Swiss Post intended to take over FedEx Express. After the provisional examination of the project, ComCo gave the merger the green light.

3.4 Product markets

3.4.1 Focus on vertical agreements

On 9 April 2018, ComCo amended its guidance on the vertical notice to take account of the landmark judgment of the European Court of Justice (EuCJ) on **third-party platform bans** in the Coty case. Previously the vertical notice guidance had not mentioned third-party platform bans or restrictions on sales via electronic market places, as there was no clear case law in relation to this. The guidance now states that a third-party platform ban, like that considered in the EuCJ judgment, does not in principle constitute a serious restraint of competition in qualitative terms. The retrospective amendment of the guidance on the vertical notice shows that ComCo modifies its guidance quickly when necessary and consistently applies the European rules in an analogous manner in Switzerland.

As in 2017, Secretariat was again involved in 2018 in the public discussion of specific examples of excessive prices for imported products in connection with the **Fair Prices Initiative** ("Put an end to Switzerland as an island of high prices"). Most cases involved Swiss consumers asking foreign manufacturers directly to supply products and being told to contact their general importer, branch or subsidiary in Switzerland. These cases do not meet the requirements for being potentially unlawful territorial protection agreements. Two examples that an association sent to the Secretariat at its request contained indications of possible unlawful absolute territorial protection agreements under Art. 5 para. 4 Cartel Act. An investigation, however, failed

to confirm these indications. Given the legal position, the Secretariat recommended that market participants make their request to a foreign dealer that is independent of the manufacturer and report import difficulties that are possibly due to an agreement restricting competition – e.g. between a manufacturer and a foreign dealer independent of the manufacturer - to the Secretariat.

On the subject of “**Switzerland as an island of high prices**” the Secretariat conducted over 20 market monitoring procedures in response to suspicions of price-fixing agreements, market foreclosures and the prevention of online trading. In some cases, corrections were recommended and implemented in order to achieve clarity and prevent misunderstandings. Individual market monitoring procedures related to possible export bans in distribution agreements outside the European Economic Area (EEA) and import bans imposed in countries outside the EEA. According to the decision of the Federal Supreme Court in the Gaba/Elmex case and of the Federal Administrative Court in the Nikon case, such bans are unlawful unless they are justified on grounds of economic efficiency. The Secretariat therefore considered the issue of the aims and objectives of these contract clauses in particular and explained the legal position in Switzerland to the foreign suppliers. It was decided not to open proceedings on the grounds that this would be disproportionate.

3.4.2 Consumer goods industry and retail trade

On 9 April 2018, ComCo concluded the investigation into the German company **RIMOWA GmbH** by reaching an amicable settlement and imposing a fine (see Section 2.1).

At its public deliberations on 18 May 2018 in the case relating to **Altimum SA**, the Federal Supreme Court came to the conclusion that Altimum SA had infringed the law on cartels in that it had required its retailers to apply minimum sale prices for mountaineering equipment (see Section 2.2). The Federal Supreme Court thus confirmed ComCo’s decision on the same matter from 20 August 2012.

On 22 October, ComCo opened an investigation into **Stöckli Swiss Sports AG**. The investigation focuses on possibly unlawful vertical price-fixing agreements between Stöckli Swiss Sports AG and its retailers. There are also indications that Stöckli Swiss Sports AG prohibits its retailers from selling Stöckli products online and does not permit cross-supplies between its retailers. The investigation will examine whether Stöckli Swiss Sports AG has actually entered into unlawful agreements under Art. 5 Cartel Act with its retailers.

3.4.3 Watch industry

In August 2018, the preliminary investigation was concluded in relation to the **after-sales services** (Service Après-Vente; SAV) provided by several watch manufacturers. The focus of the preliminary investigation was the question of whether their refusal to supply independent watchmakers with spare parts is problematic under competition law. A key issue in the competition law assessment of the case was that proceedings were pending at the same time in the EU in which the same questions had been raised in relation to the same watch manufacturers. The EU Commission held that the SAV systems were neither unlawful agreements nor an abuse of market dominance. In the present case, the ComCo Secretariat decided not to open an investigation. This was because no grounds were identified in the enquiries that pointed to a judgment being reached that differed from the EU decision. The Secretariat therefore regarded the opening of investigation proceedings as disproportionate.

On 13 November 2018, proceedings were opened under Art. 30 para. 3 Cartel Act in the case of **Swatch Group end to supply**. The subject of these proceedings is the amicable settlement approved in a decision dated 21 October 2013, which permits ETA SA Manufacture Horlogère Swiss (ETA), a subsidiary of The Swatch Group AG, to gradually reduce supplies of mechanical watch movements to its current customers. The amicable settlement provides that ETA is

no longer under any obligation to supply movements after 31 December 2019. The proceedings were opened on the basis of indications that from 2020 there may not be sufficient numbers of alternative sources available to satisfy the watch manufacturers' demand for mechanical watch movements. Given the current level of knowledge of the case, it is impossible to assess whether it is necessary to revoke or amend the decision that ComCo made at the time. This requires an analysis of the current market and competition conditions, which will be carried out as part of the proceedings just opened.

3.4.4 Automotive sector

On 3 May 2018 the Federal Administrative Court issued two judgments in the case of **VPVW Stammtische / Projekt Repo 2013**. Two addressees of ComCo **ruling** of 6 June 2016 **on the approval of the amicable settlement** with AMAG had challenged the ruling. The Federal Administrative Court took the view that the two parties have no title to appeal against the approval ruling, with the result that it dismissed their appeals. In the same case, the Federal Administrative Court with judgments dated 3 and 22 May 2018 rejected two appeals against the ComCo **ruling on publication** dated 20 June 2016. The court concluded that the passages that the appellants wanted to be redacted did not constitute trade secrets. The court followed the judgment of the Federal Supreme Court in the case of Nikon and stressed that it was not possible to give protection to a secret if its content was in breach of competition law. Information that would provide proof of behaviour that is contrary to competition law is not entitled to be treated as confidential.

On 26 June 2018, ComCo opened an investigation into AMAG Automobil und Motoren AG and against other vehicle dealers of various Volkswagen Group brands in Ticino (**Concessionari Volkswagen**). The investigation focuses on indications of bid rigging in public tendering procedures for contracts to supply vehicles and vehicle fleets in the canton of Ticino. The vehicle dealers of various Volkswagen Group brands in Ticino are alleged to have agreed on what offers they would submit to the Canton of Ticino and Ticino communes. The investigation will examine whether unlawful agreements affecting competition in this sense were actually concluded.

In October 2018, the Secretariat announced the conclusion of the preliminary investigation into the **AMAG Sales Network**. The investigation revealed that AMAG gave preference to service partners that were also partner dealers. Linking servicing and sales is contrary to the principles of the ComCo notice on the competition law treatment of vertical agreements in the motor vehicle sector (MV Notice). In the circumstances the Secretariat recommended that AMAG should in future also work with partners which only service vehicles and which are not involved in sales. In relation to the allegation that independent partner dealers were being discriminated against in comparison with the retail businesses belonging to the Group, the Secretariat noted that the AMAG Group has been running its import and retail operations since 1 January 2018 as separate legal entities and the same conditions apply to the retail businesses that belong to the Group as for independent partner dealers. AMAG also announced that it was terminating numerous sales and service contracts. However, this move was consistent with the principles in the MV Notice on the termination of contracts. The Secretariat decided not to open an investigation provided AMAG implements the Secretariat's recommendations.

The Secretariat also conducted a series of market monitoring procedures in the automobile sector: in addition to AMAG, other Swiss general importers of new vehicles announced the termination of numerous **sales and service contracts**. The Secretariat examined these terminations in response to complaints from sales and service partners. In all cases, the principles on terminating contracts in the MV Notice had been complied with.

In addition, the Secretariat looked into reports from end customers relating to **restrictions on the manufacturer's guarantee** for vehicles and motorhomes imported directly or in parallel into Switzerland. In these cases, the Secretariat confronted the vehicle manufacturers and

importers concerned with the allegations and drew their attention to the principles in the MV Notice. The enquiries did not reveal any indications of violations of competition law.

One report from an end customer related to **the restriction of deliveries to a foreign vehicle agent** in Switzerland. The Secretariat's enquiries revealed that this agent was not able to arrange the sale of any motor vehicles in Switzerland as a result of the manufacturer's initial registration regulations, which suggested that there may have been an unlawful territory protection agreement. However, at present there are various other channels that end customers and agents can use to import new vehicles into Switzerland directly or in parallel via dealers in order to take advantage of cheaper foreign prices. Taking account of these circumstances and for reasons of proportionality, the Secretariat decided not to open proceedings.

In addition, the Secretariat followed up various reports from dealers and workshops relating to **restrictions on the sale of spare parts to independent workshops**. It drew the attention of the car manufacturers and importers against which the allegations had been made to the principles in the MV Notice and asked them for their comments. The enquiries did not disclose any indications of unlawful agreements affecting competition.

Lastly the Secretariat regularly responded to enquiries from dealers and workshops as well as end customers. These related to matters such as the refusal of manufacturers to honour guarantees, the termination of dealership and/or service contracts, requirements for the authorisation of a sales and service network, the prevention of parallel and/or direct imports and **access to technical information** from various car manufacturers and brands. The Secretariat replied to these enquiries on the basis of the principles in the MV Notice and ComCo's guidance on the MV Notice.

3.4.5 Agriculture

The Secretariat was involved in around 40 office consultation procedures relating to agriculture, in particular with regard to amendments to ordinances, proposals from Parliament and the development of agriculture policy. Among other things, it repeatedly advocated reducing the protection given to the Swiss agricultural sector against foreign imports. In addition, the Secretariat received a number of enquiries relating to agricultural topics, which led to meetings, the provision of advice and market monitoring procedures.

3.4.6 Other sectors

On 29 January 2018, ComCo concluded the **engine fuel** investigation involving Bucher AG Langenthal and Husqvarna Schweiz AG with amicable settlements and of a fine of around CHF 610,000 (see Section 2.1).

3.5 Internal market

The **Internal Market Act (IMA)** guarantees intercantonal freedom of movement and a public bidding process for concessions and cantonal procurements.

The most important case in the law of the internal market related to the **Ticino Act on Commercial Enterprises (LIA)**. The Canton of Ticino Administrative Court upheld the appeals filed by ComCo (see Section 2.2). Commercial enterprises from other cantons were therefore able to invoke the IMA in order to gain access to the market in Ticino without having to be registered under the LIA. ComCo received over 50 enquiries relating to the LIA from companies from outside Ticino and was active in providing updates on the legal position, including posting questions and answers on its website. ComCo was also in contact with the authorities in Ticino and contributed to securing the quick implementation of the judgments. The Cantonal Parliament in Ticino decided on 6 November 2018 to repeal the LIA.

The Federal Supreme Court issued a judgment on 12 October 2018 relating to the outpatient care (**Spitex**) in **Aarburg**. The case focused on the question of the extent to which the allocation of contracts for outpatient care services to private organisations requires a public tendering process. This has been a controversial issue for a long time, and neither the case law nor expert opinion was settled. The Federal Supreme Court held that the allocation of these public service contracts was subject to the law on public procurement. In reaching its decision, the Court gave more weight to the commercial nature of the public service contract than to the fact that the service provider was a charitable organisation. ComCo submitted its opinion on the case to the Federal Supreme Court, which the Court took into account in its decision.

In a judgment dated 22 February 2018, the Canton of St. Gallen Administrative Court upheld an appeal filed by ComCo in a case relating to the **Stadt Wil** (town of Wil). The Stadt Wil awarded a contract for planning the reorganisation of its administration directly, i.e. without issuing a public invitation to tender. The Stadt Wil gave several reasons for awarding the contract directly. The cantonal administrative court did not regard any of these reasons as justifying the direct award of the contract. An unlawful direct award infringes Art. 5 IMA.

ComCo submitted an opinion to the Federal Supreme Court in appeal proceedings relating to the **luxury Hotel Metropole in Geneva**, which owned by the city. The dispute relates in particular to whether a public invitation to tender must be issued for the transfer of the Hotel Metropole's operations to the private sector. The fact that the hotel fulfils a public function suggests that the law on public procurement should apply, while the hotel's qualification as a financial asset suggests that it does not. The Federal Supreme Court has still to issue its judgment.

The ComCo Secretariat provided an opinion on the **award of concessions for advertising billboards** in supervisory proceedings conducted by the Canton of **Fribourg**. The IMA provides that transferring the benefit of communal monopolies to private individuals must be carried out by means of a public and non-discriminatory tendering process. In 2016, the Federal Supreme Court held that under Art. 2 para. 7 IMA the award of concessions for billposting had to be based on a public tendering process.

The **awareness campaigns** on bid rigging and the law of the internal market conducted in five cantons in French-speaking Switzerland and received with a great deal of interest in the cantonal administrations will help to ensure in particular that more account is taken of internal market law.

3.6 Investigations

In the past year, the Centre of Competence for Investigations carried out searches of houses and business premises in four investigations. The year began with a major search of houses and premises in the canton of Geneva in connection with an investigation relating to installation and electricity services; the year ended with a major search of the offices of Swiss financial institutions in connection with the Boycott Apple Pay case.

In each of these searches, a large volume of electronic data was seized as potential evidence. As a result, the Centre of Competence for Investigations was heavily involved in the triage of the electronic data, an initial step required to separate information subject to lawyer-client confidentiality and private information from other data. The Centre of Competence for Investigations supported the services responsible for these procedures in their analysis of the electronic data.

In connection with the searches, witnesses and other parties were questioned on site and in the subsequent days. These 'first hour' interviews are conducted in order to quickly establish the facts of the case and to prevent any collusion between persons suspected of involvement in unlawful activities. In one investigation, the company involved filed a legal objection against

the interviews. The company applied to the Federal Administrative Court for an interim injunction. Such procedural steps cause delays and reduce the significant effects that the interviews can have as an investigation measure. The Centre of Competence was closely involved in these procedures. It drafted protective briefs containing the arguments of ComCo Secretariat for submission to the Federal Administrative Court. The Federal Administrative Court ultimately decided in favour of the competition authorities.

3.7 International

EU: The competition law cooperation agreement between Switzerland and the EU, which has been in force since 1 December 2014, has proven its value so far. The competition authorities in Bern and Brussels are regularly in contact. The agreement encourages an exchange of experiences and facilitates close cooperation and coordination in investigations, including the exchange of confidential information. The ComCo Secretariat has already contacted the case teams of the EU Commission's Directorate-General for Competition in various investigations, in order to discuss procedural issues and the substantive assessment of the case. In the case of voluntary admissions, contact in order to clarify procedural and material issues only takes place if the company concerned gives its written consent. In the merger procedures with parallel reports in Switzerland and in the EU, the Secretariat no longer requires the consent of the parties to discuss technical and substantive issues with the staff of the Directorate-General for Competition. Such exchanges take place regularly to ensure that there are no unnecessary inconsistencies in parallel proceedings. In market monitoring procedures and preliminary investigations, there are regular contacts to establish whether the EU Commission also takes the view that there is a problem under competition law or to obtain additional information with a view to making progress with the case. Overall, the Agreement facilitates the enforcement of competition law in Switzerland in cases that also involve issues of EU competition law.

ECN: A representative of the Secretariat took part in the meetings of the banking and payment group of the European Competition Network (ECN). He provided regular updates on the implementation of the amicable settlement on reducing the interchange fee in Switzerland.

Germany: At the beginning of 2018, the Federal Council issued the mandate to negotiate with Germany on a bilateral agreement on cooperation in the field of competition. Talks with Germany will begin soon. Germany is by far Switzerland's most important trading partner worldwide. In view of this, ComCo would very much welcome a competition agreement with Germany.

OECD: Representatives of ComCo and the Secretariat attended the two annual meetings of the OECD Competition Committee in Paris. Discussions focused on competition policy in the digitalised economy in relation to blockchains, personalised prices, e-commerce and taxi services. An emerging priority is competition issues in healthcare markets, such as disproportionately high prices for medicines. In the workshops organised by the OECD on the topics of uncovering cartels and managing complex cartel cases, ComCo gave a presentation on its experiences in successfully uncovering bid rigging through statistical procedures (screening).

ICN: The competition authorities monitored international developments in competition law as a member of the International Competition Network (ICN). In 2017, the Agency Effectiveness Working Group published two new works, on "Guidance on Investigative Process" and "Guiding Principles for Procedural Fairness". The Cartel Working Group conducted several webinars in which the Secretariat also took part. Among the topics discussed was "leniency incentives and disincentives". The head of the Centre of Competence for Investigations also participated in the Cartel Working Group workshop in Tel Aviv on "How to crack a cartel step by step". ComCo was also represented at the workshop of the Working Group on Unilateral Conduct in South Africa. Issues raised there included the assessment of dominance, predatory pricing and exclusive contracts. In 2018, the Merger Working Group published a revised version of the ICN Recommended Practices for Merger Notification and Review Procedures. In January

2018, the Secretariat responded to a questionnaire from the working group on the subject of vertical mergers and participated in several telephone conferences in the course of the year. A ComCo delegation attended the ICN annual conference in New Delhi in March 2018. In the area of ICN advocacy, the Swiss working group regularly participated in telephone conferences on various advocacy projects and workshops. The working group also responded to a survey on the collection of fines and monitored the development of advocacy in digital markets in various ICN member states.

UNCTAD: The Director of the Secretariat took part in the presentation of the evaluation report on the COMPAL cooperation programme at the UNCTAD annual conference. The conclusion of Phase III of the COMPAL programme funded by SECO also brought an end to a commitment lasting several years for the Secretariat, in which 23 employees of competition authorities, mainly from Latin America, were able to benefit from internships in the Secretariat.

3.8 Legislation

Following the rejection of the planned reform of the Cartel Act in September 2014, the current situation with **parliamentary proposals** relating to the Cartel Act that have been submitted but are still pending is as follows:

- The **Altherr Parliamentary initiative** of 25 September 2014 “Excessive import prices. End compulsory procurement on the domestic market” (14.449), which has been endorsed by the committees of both Councils, has been adjourned until autumn 2019.
- The **Hess Motion** of 18 June 2015 “For a more effective Cassis de Dijon principle” (15.3631) was rejected by both Councils in March and June 2018 respectively as a result of a report from the Federal Council (17.050).
- The **Bischof Motion** of 30 September 2016 “Ban adhesion contracts between online booking platforms and the hotel industry” (16.3902) was approved by both Councils; the EAER is expected to draft a related bill by autumn 2019 that will be submitted for consultation.
- The **Fournier Motion** of 15 December 2016 “Improve the position of SMEs in competition proceedings” (16.4094) demands deadlines for courts, procedural costs for parties, more lenient sanctions for SMEs and the publication of decisions only after they have become legally enforceable. Following its approval by the Council of States, on 5 March 2018 the National Council accepted the first two points and rejected the other two. The EAER is currently drafting a bill that will be submitted for consultation.
- On 8 March 2018, the National Council accepted the **National Council Economic Affairs and Taxation Committee Motion** of 14 August 2017 “Create an effective instrument to prevent unreasonable periodical prices” (17.3629); the motion has still to be debated in the Council of States.
- The **Pfister Interpellation** of 14 December 2017 on the “Improper foreclosure of the Swiss motor vehicle market” (17.4151), which relates to parallel and direct imports of vehicles, is being debated in the National Council.
- The **Pfister Motion** of 27 September 2018 on the “Effective implementation of the Cartel Act in the motor vehicle sector” (18.3898) demands that the Federal Council enact an ordinance to protect consumers and SMEs from practices in the motor vehicle sector that distort competition. The Federal Council has called for the motion to be rejected, but the Councils have yet to consider it.
- The **Vogler Interpellation** of 28 September 2018 on “Speeding up ComCo proceedings” (18.4058), which relates to the length of time taken to process cases, is being considered by the National Council.

- The **Nantermod Motion** of 12 December 2018 on “Fair and effective procedures in competition law” (18.4183), which calls for changes to the procedural rules on inspecting files and compulsory fees in preliminary investigations has not yet been considered.
- The **Français Motion** of 13 December 2018 “The revision of the Cartel Act must take account of both qualitative and quantitative criteria in assessing the illegality of an agreement restricting competition” (18.4282), which calls for an amendment to Art. 5 Cartel Act, has not yet been considered.
- The **Bauer Motion** of 14 December 2018 on “ComCo investigations: the presumption of innocence must take precedence” (18.4304) demands the repeal of Art. 28 Cartel Act, which provides for the public announcement of the opening of an investigation, naming the parties. It has not yet been considered.

The Federal Council has drafted an indirect counter-proposal to the **Fair Prices Initiative** (“Put an end to Switzerland as an island of high prices – for fair prices”), which was submitted in December 2017, and which provides for the introduction of a provision in the Cartel Act on relative market power, but which is limited to preventing misconduct by companies in cross-border competition. Currently the EAER is preparing a report on the consultation procedure which was concluded at the end of November 2018 as well as the dispatch on the Fair Prices Initiative and the Federal Council’s indirect counter-proposal.

SECO has overall responsibility for drafting the revision bills on behalf of the administration. The Secretariat is also involved in this work.

4 Organisation and Statistics

4.1 Competition Commission and Secretariat

In 2018 ComCo held 14 full or half-day plenary sessions. At these meetings it took the decisions on matters related to the Cartel Act and the Internal Market Act. More details of these can be found in the statistics below (see Section 4.2).

The following staff changes took place at ComCo in 2018:

- **Andreas Heinemann** took over as President from 1 January 2018, as the successor to Vincent Martenet.
- **Danièle Wüthrich-Meyer** was appointed Vice-President from 1 January 2018.
- **Isabel Martínez** replaced Daniel Lampart as a member of the Competition Commission from 1 January 2018.
- The Federal Council appointed two new Competition Commission members on 9 March 2018: **Clémence Grisel Rapin** and **Nicolas Diebold**. They took office on 1 July and 1 April 2018 respectively.

In 2018 the following changes took place in key positions in ComCo Secretariat:

- **Rafael Corazza**, Director of the Secretariat, retired on 31 July 2018 at the age of 67.
- On 23 May 2018, the Federal Council appointed **Patrik Ducrey** as the new Director of the Secretariat. The former Deputy Director took up his new post on 1 August 2018.
- On 17 September 2018 ComCo appointed **Andrea Graber Cardinaux** as Vice Director of the Secretariat. She took up her new post on 1 October 2018.

- **Frank Stüssi** took over the role of Head of Communications from 1 October 2018 and on 14 December 2018 was promoted by the Federal Council from Vice Director to Deputy Director from 1 January 2019.

Rafael Corazza certainly made his mark in the twelve years he served as Director of the Secretariat. He studied at the University of St Gallen (HSG) and the University of Madrid. He graduated in 1976 with a degree in economics from the HSG and obtained a doctorate there in 1985. He completed traineeships in companies in the private sector and was also an assistant at the Institute of Economics at the HSG. During his studies, he worked as an independent consultant. Rafael Corazza joined the Federal Administration in 1984 as secretary to the Cartels Commission and worked from 1987 to 2006 at the Office of the Price Commissioner, initially as deputy director and director and ultimately as Deputy Price Commissioner. On 9 June 2006, the Federal Council appointed him Director of the Secretariat from 1 October 2006.

During his period in office, ComCo reached a series of landmark decisions. Numerous important projects were carried out and developments achieved during his term of office. Rafael Corazza was also the member of various panels of experts. Two defining projects are worth highlighting: the evaluation of the Cartel Act, with the work that arose from that project, and screening as a statistical method for detecting agreements affecting competition.

He had only just assumed office when the Head of the then Federal Department of Economic Affairs (FDEA, now the EAER) at the time, Federal Councillor Doris Leuthard, mandated him in winter 2006/2007 with the **evaluation of the Cartel Act**. Under Art. 59a of the revised Cartel Act, the Federal Council was responsible for evaluating the effectiveness of the measures and the enforcement of the Cartel Act, reporting to Parliament and submitting proposals for further action. Rafael Corazza set up and chaired a broadly-based Cartel Act evaluation group to carry out this comprehensive task. The evaluation of the Cartel Act included a consolidated report based on 15 reports and studies (around 1,000 pages of documentation in total). The consolidated report contained an assessment of the effects and effectiveness of the Cartel Act at the time, highlighted any need for action and concluded with a series of recommendations to Parliament and the executive (Federal Council, FDEA, ComCo and its Secretariat).

The recommendations made to ComCo and its Secretariat led to ComCo's reorganisation and numerous organisational developments. ComCo opted for a presidency model, in which five entities at Commission level (Presidency, three chambers, plenary session) were replaced by two (Presidency, plenary session), thus reducing the work involved in allocating and separating responsibilities, exchanging information and coordinating tasks. In four working groups (commission work, management in the Secretariat, core processes, and IT), ComCo and the Secretariat devise various measures to improve ComCo's decision-making processes, its efficiency and management, the Secretariat's process orientation and to improve coordination between the Commission and the Secretariat.

The recommendations made to Parliament and to the then FDEA also led to wide-ranging legislative work and consultations. Even though the revised legislation ultimately failed to receive Parliament's approval, the work involved formed the basis for the ongoing discussions and the reform efforts that began again later.

A second focus of Rafael Corazza's work was developing an instrument for the active statistical exposure of unlawful agreements. Every week, ComCo and its Secretariat receive a range of reports and complaints about potential infringements of competition law, which they consistently follow up. The question that Rafael Corazza nevertheless raised and to which he demanded an answer was whether cartels can be actively uncovered by data analysis. His main aim was to increase the deterrent effect of the Cartel Act. As combating price fixing in public procurement had been a ComCo priority since 2008, Rafael Corazza began the pilot project on **screening**. Its aim was to analyse data on tendering procedures and to develop statistical methods that would highlight irregularities in the bidding process. He assigned this task to a

team of employees, requested the cantons to provide data on tendering procedures and pressed ahead with the work that eventually led to a screening tool.

The statistical analysis of data requires a thorough understanding of market structures and above all data on the bidding behaviour of companies in tendering procedures. Obtaining data itself proved to be a sticking point. After the Canton of St Gallen made data available on tendering procedures, the Secretariat developed a statistical method that identified irregularities in agreements affecting competition during the procurement process. Two financial ratios were the key: the coefficient of variation and the relative similarity measure (see Section 5.3).

The development of the screening tool and the related statistical analysis of data on bids from the Canton of St. Gallen led in April 2013 to an investigation being opened into agreements in the road construction and civil engineering sector in the See-Gaster region, in which ComCo uncovered hundreds of price-fixing agreements in July 2016 (see Sections 3.1.1, 5.3 and 5.4). With the conclusion of this investigation and the successful application of the screening tool, an important milestone was reached: the statistical analysis of data can be actively used to detect cartels. The effectiveness of the analysis generated international interest in the screening tool, from other competition authorities, the OECD and from major procurement offices. Thanks to Rafael Corazza's tireless commitment, the Secretariat garnered international esteem in the fight against bid rigging.

Rafael Corazza ran the ComCo Secretariat with enthusiasm and foresight. He knew how to motivate his staff and always appreciated their work. He worked tirelessly, without seeking the limelight. Instead, he always highlighted the work of others and allowed them to reap the praise they were due. He concentrated on making progress with his projects, using his staff in a targeted manner and helping to develop the authority. During his 12 years in office, Rafael Corazza saw the competition authorities prosper and contributed decisively to developing the application of the Cartel Act. We will continue to build on the excellent foundations he has laid. We wish to express our heartfelt thanks to Rafael Corazza.

4.2 Statistics

At the end of 2018, the **Secretariat** employed 68 (previous year 72) staff members, 39.70 per cent of whom were women (previous year 43%). The 68 employees include both full-time and part-time staff representing a total of 58.1 (previous year 60.9) full-time positions. The number of employees involved in matters relating to the application of the Cartel and Internal Market Acts (including the executive board) is 51 (previous year 53), corresponding to 44.3 full-time positions (previous year 46.1). Twelve employees (previous year 14) work in the Resources and Logistics Division, providing support for all ComCo's work; this corresponds to 8.8 (previous year 9.8) full-time positions. The Secretariat also offers 5 (previous year 5) internships. These 5 interns work full-time.

The statistics on the work carried out by ComCo and its Secretariat in 2018 are set out below:

	2018	2017
Investigations		
Conducted during the year	24	30
Carried forward from previous year	18	26
Investigations opened	6	4
New investigations from divided investigations	0	0
Final decisions	4	12
Amicable settlements	2	2
Administrative rulings	2	4
Sanctions under Art. 49a para. 1 Cartel Act	4	11
Part-rulings	0	0
Procedural rulings	0	1
Other rulings (publications, costs, searches, etc.)	2	3
Precautionary measures	0	1
Sanctions proceedings under Art. 50 ff. Cartel Act	0	0
Preliminary investigations		
Conducted during the year	15	18
Carried forward from previous year	10	9
Opened	5	9
Concluded	7	7
Investigations opened	2	1
Modification of conduct	3	3
No consequences	2	3
Other activities		
Notifications under Art. 49a para. 3 let. a Cartel Act	2	2
Advice	21	21
Market monitoring	72	63
Freedom of information applications	20	9
Other enquiries	581	635
Mergers		
Notifications	34	32
No objection after preliminary investigation	27	27
Investigations	3	3
Decisions of ComCo after investigation	3	3
Authorisation refused	0	1
Authorised with conditions/requirements	0	0
Authorised without reservations	3	2
Early implementation	0	0
Appeal proceedings		
Total number of appeals before the Federal Administrative Court and Federal Supreme Court	37	31
Judgments of the Federal Administrative Court	7	7
Success for the competition authority	5	5
Partial success	1	1
Unsuccessful	1	1
Judgments of the Federal Supreme Court	1	2
Success for the competition authority	0	2

Partial success	1	0
Pending at the end of the year (before Federal Administrative Court and Federal Supreme Court)	33	21
Expert reports, recommendations and opinions etc.		
Expert reports (Art. 15 Cartel Act)	0	1
Recommendations (Art. 45 Cartel Act)	0	0
Expert opinions (Art. 47 Cartel Act, 5 para. 4 PMA or 11a TCA)	2	3
Follow-up checks	0	0
Notices (Art. 6 Cartel Act)	0	1
Opinions (Art. 46 para. 1 Cartel Act)	152	210
Consultation proceedings (Art. 46 para. 2 Cartel Act)	8	8
IMA		
Recommendations / Investigations (Art. 8 IMA)	0	1
Expert reports (Art. 10 IMA)	3	5
Explanatory reports (Secretariat)	94	73
Appeals (Art. 9 para. 2 ^{bis} IMA)	0	0

A glance at the statistics for 2018 and a comparison with the figures from 2017 reveal the following:

- In 2018, **fewer final decisions** were taken than in the previous year. This is because seven of the twelve final decisions taken in 2017 related to bid rigging in the canton of Graubünden, and relate to matters that originally formed part of a larger investigation which was divided into ten separate investigations in the course of the proceedings (see Section 3.1.1). In view of this, ComCo also imposed fewer sanctions under Art. 49a para. 1 Cartel Act in 2018 than in the previous year.
- The Secretariat conducted a **similar number of preliminary investigations** in 2018 to the previous year.
- In 2018, ComCo received notification of a **similar number of merger procedures** to 2017. Likewise, in 2018 ComCo approved the same number of mergers after the preliminary examination and a similar number following a detailed examination as in the previous year. On the other hand, in 2018 ComCo did not prohibit any mergers.
- The number of **appeals pending** before the courts **increased** in 2018 when compared with 2017.
- The Secretariat concluded **more market monitoring procedures** in 2018 than in the previous year. In particular the Product Markets Division assessed a large number of complaints as part of market monitoring procedures, for example on the issue of “Switzerland as an island of high prices” (see Section 3.4.1) and in the automotive sector (see Section 3.4.4)
- In 2018, the Secretariat had to provide **more guidance on the IMA** than in the previous year. This was mainly due to the large number of enquiries received from skilled-trades businesses in connection with the LIA (see Section 3.5). The three expert opinions on the IMA were all submissions in appeal proceedings before the Federal Supreme Court.

5 Bid Rigging Agreements

5.1 Introduction

In a 2004 survey carried out by the Secretariat of the Federal Procurement Commission (FPC), around half of those questioned had relevant experiences of bid-rigging agreements. On 4 April 2005, the Secretariat with the agreement of a Presidency member opened the investigation into “Road surfacing in Ticino”, which culminated in a landmark ComCo decision on 19 November 2007. In 2006, as part of efforts made at the time to revise the law on public procurement, the Secretariat prepared a report on “Competition and Procurement Law”, in particular considering the risks of bid rigging and proposing a series of measures to strengthen competition that were to be included in the revised law on public procurement. This and other experiences and efforts made combating bid rigging a priority for ComCo from 2008.

ComCo was well aware that bid rigging agreements are normally associated with consequences such as higher prices, the maintenance of structures and lower incentives for businesses to improve efficiency or to innovate. The OECD estimates that prices are made 10–20% higher as a result of bid rigging agreements. In the abovementioned investigation into road surfacing in Ticino, ComCo found that bids for road surfacing work after the time of the cartel were on average around 30% lower than while the cartel was in operation. More recent empirical studies indicate that the prices can be around 25–45% higher on average as a result of quantity, price-fixing or bid rigging agreements than in situations where no such agreements exist: bid rigging damages the national economy. It leads to excessive public expenditure, with direct or indirect effects on the amount of tax that people have to pay in Switzerland. Given that expenditure on public procurement for buildings, goods and services amounts to over CHF 40 billion (at federal, cantonal and communal levels), the losses potentially caused by bid rigging become all the more significant.

There are three aspects to the work that ComCo and its Secretariat does:

- preventing and raising awareness of bid rigging agreements,
- passively and actively exposing bid rigging agreements, and
- taking legal action against those involved in bid rigging agreements.

5.2 Prevention and raising awareness

Preventing bid rigging agreements altogether or nipping them in the bud is more effective than simply taking action against them under competition law. If procurement offices are well-informed and educated, this goes a long way towards combating bid rigging. Accordingly, since 2007, the Secretariat has offered the module “Ensuring competition in public procurement” as part of the programme of basic and continuing professional education provided by the Competence Centre for Federal Public Procurement (CCPP) to the Federal Administration and federal public corporations. The Secretariat has also approached the cantons to offer **awareness-raising events** that help in combating bid rigging and applying the Internal Market Act. In the cantons of German-speaking Switzerland half or full-day events have been held, primarily in 2009 and 2014 (and more are planned for 2019); in French-speaking Switzerland these events were held in 2012 and 2018 and in Ticino in 2018. Cantonal interest in these events has grown over time. They focus on the problem that bid rigging poses for competition and the economy, the legal action and decisions taken by ComCo, and the detection and prevention of bid rigging agreements. Public officials responsible for procurement should be able to answer the following questions after attending an awareness-raising event:

- What is a bid-rigging agreement as far as competition law is concerned?

- How can procurement offices identify and prevent bid rigging agreements?
- What is ComCo's practice on this matter?
- How can ComCo support a procurement office that suspects a bid rigging agreement is in operation?
- What are the consequences for the procurement office if ComCo opens an investigation under competition law?
- What instruments does ComCo have to take legal action against bidding cartels?

In addition to these events, ComCo and its Secretariat make presentations at conferences, such as those organised by professional associations, federal agencies and universities. In the course of passing on their experiences and expertise, the competition authorities learn more about the practical problems that can arise in the public procurement process.

The increased awareness of procurement offices is not only dependent on education but also on the decisions that ComCo reaches. The first major investigations and decisions relating to bidding cartels in the cantons of Ticino, Aargau and Zurich sent a jolt through the industry. This was not only perceptible in procurement offices, but also in companies and other persons concerned. A steadily increasing number of enquiries and reports of suspicious activities were received. The latter have led to some of the more recent proceedings conducted by the competition authorities in the procurement sector. There is thus a correlation between "prevention and raising awareness" and "taking legal action".

Prevention and raising awareness also include the work done by the competition authorities in relation to revising the **law on public procurement**. The competition authorities can provide the benefit of their knowledge and experience, whether by participating in working groups within the Federal Administration, by providing expert opinions in consultation proceedings, or by making recommendations and submitting reports.

5.3 Exposure, including screening

Every week, the Secretariat receives a variety of reports and complaints about possible infringements of competition law. These reports come mainly from companies aggrieved by agreements affecting competition or which are themselves participating in such agreements (the latter in the case of voluntary admissions), from members of the public, from whistle-blowers, and from procurement offices. The Secretariat follows up all these reports, which are vital to the work of the competition authorities and to exposing infringements of competition law.

The Secretariat set itself the goal of uncovering bid rigging agreements, not simply in response to reports, but also proactively on its own initiative. The Secretariat therefore began to analyse data on tendering procedures and to develop statistical methods that reveal irregularities in behaviour patterns in bidding processes. Two key indicators became the focus, the coefficient of variation and the relative similarity measure. The variation in bid prices during tendering procedures plays a crucial role in the analysis of bid data. The spread of the bid prices in phases when cartels are in operation differs from situations without cartels and can be quantified using the coefficient of variation. In addition, the Secretariat found that the differences between the first and second as well as the other bid prices during phases when cartels are in operation is different from times when there are no cartels. These differences can be quantified using the relative similarity measure. These two key indicators form the basis for the Secretariat's screening tool.

The statistical analysis of data on bids submitted in the canton of St. Gallen led in April 2013 to the opening of an investigation on unlawful agreements in the road construction and civil engineering sector in the See-Gaster region. ComCo's investigation concluded with a decision

dated 8 July 2016, in which ComCo held that eight road construction and civil engineering sector companies in the See-Gaster region (SG) and in March and Höfe (SZ) had agreed on prices in several hundred tendering procedures between 2002 and 2009 and had decided which company would be awarded the contract (see Section 3.1.1). This represented an important milestone. The screening tool developed by the Secretariat had been proven to work. It can be used to expose bid rigging agreements. This means the Cartel Act has a greater deterrent effect. Companies that enter into bid rigging agreements must expect their collusion to be discovered because of the way in which they fix the prices in tendering procedures.

ComCo and the Secretariat have presented the screening tool and demonstrated its successful use at various events in Switzerland and abroad, in particular to the OECD, foreign competition authorities and procurement offices (see Section 3.7). There is considerable interest in the screening tool. The method has also been described in research projects and has now found its way into scientific research and literature in the field of economics.

5.4 Legal action

In the past ten years or so, ComCo has reached a series of important decisions on bidding cartels and developed the related case law. The following table provides an overview of the sanctions imposed by ComCo in bid rigging cases from 2007 to 2018.

ComCo decision	Year of decision	Duration of cartel	General agreement/Individual agreements	Total amount of sanction (in CHF)	Legally binding
Road surfacing in Ticino	2007	1999–2003, in certain cases 2005	General agreement	0 (direct sanctions introduced in 2004)	Yes
Electrician firms in Bern	2009	2006–2008	Individual agreements	CHF 1.2 million	Yes
Road construction and civil engineering in the canton of Aargau	2011	2006–2009	Individual agreements	CHF 3.8 million	Still partially pending before the Federal Supreme Court
Road construction and civil engineering in the canton of Zurich	2013	2006–2009	Individual agreements	CHF 489,000	Yes
Tunnel cleaning	2015	2008–2013	General agreement	CHF 161,000	Yes
Construction services in See-Gaster	2016	2002–2009	General agreement	CHF 5 million	Still partially pending before the Federal Administrative Court
Eflare safety beacons	2016	2015	Vertical territory protection agreement	CHF 33,000	Yes
Structural and civil engineering in the Münstertal	2017	2004–2012	General agreement	0 (as a result of voluntary admissions and the bankruptcy of one company)	Yes
Structural and civil engineering Engadin III–VIII	2017	2009–2012	8 individual agreements	CHF 1 million	2 decisions legally binding, 4 decisions pending before the Federal Administrative Court

Structural and civil engineering in the Engadin I	2018	1997–2012	Several general agreements, 11 individual agreements	CHF 7.5 million	Still partially pending before Federal Administrative Court
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In the summer of 2019, it is planned to issue the final two of ten decisions on bid rigging in the canton of Graubünden (see Section 3.1.1). Investigations are also ongoing relating to suspected bid rigging agreements in the electricity industry in Geneva (see Section 3.2.3) and possible bid rigging agreements in public tendering procedures for the supply of vehicles in the canton of Ticino and in Ticino communes (see Section 3.4.4).

The decisions taken to date have allowed ComCo to consolidate its practices on bid rigging agreements and to clarify fundamental issues. The following points should be highlighted:

- Bid rigging agreements in which the participant companies arrange which company should be awarded the contract or in which there is an arrangement on the amount of the bids are normally regarded as **price-fixing agreements and/or agreements between business partners**. As hard horizontal cartels they regularly meet the criteria for a violation of Art. 5 para. 3 Cartel Act, and in principle lead to sanctions being imposed.
- A company is normally liable to sanctions for participating in a bid-rigging agreement even if it does not generate any revenue from the tendering procedure concerned (“**a violation without turnover**”). This applies most obviously where a company submits a bid knowing it will be unsuccessful or when a bid, despite collusion, is still unsuccessful. The fact that violations without turnover also give rise to sanctions was confirmed by the Federal Administrative Court in its judgments in the case relating to road construction and civil engineering in the canton of Aargau (see Section 3.1.1). According to more recent ComCo decisions in the cases Engadin I and Engadin III–VIII, the sanctions are assessed on the basis of the revenue the company acting unlawfully should have achieved in accordance with the agreement had its bid been successful.
- In practice, the **distinction between general agreements and individual agreements** is particularly important. In a general agreement, the companies concerned coordinate their conduct in tendering procedures over several projects. In contrast, in individual agreements the participant companies coordinate their bidding behaviour in relation to one specific invitation to tender. General agreements can arise for example in the form of rotation cartels, quota cartels or territorial agreements. The distinction between general agreements and individual agreements has consequences for the presentation of evidence and the sanctions imposed. Where there is a general agreement, ComCo does not necessarily have to provide evidence of which specific tendering procedures were manipulated by the agreement. In addition, in assessing the sanctions, the total revenue achieved in the relevant market is decisive, even if competition was not eliminated or adversely affected in all the tendering procedures. ComCo was called on to adjudicate on general agreements in the cases of road surfacing in Ticino, tunnel cleaning, See-Gaster construction services, structural and civil engineering in the Münstertal and structural and civil engineering Engadin I, to cite a number of examples.
- The cases before ComCo so far have concerned bid rigging agreements, not **consortiums**. Consortiums are not normally an issue for ComCo, because in principle they do not constitute agreements affecting competition in terms of Art. 4 para. 1 Cartel Act. Normally they promote competition, in that they make it possible for companies (in particular SMEs) to bid for and carry out a specific project when it would not otherwise be possible. ComCo takes action against consortiums where they are acting as a smokescreen for bid rigging agreements. In the case relating to electrical installation work in Bern for example, companies formed consortiums to submit bids for individual projects, but did not disclose this to the clients. The consortium partners also submitted separate bids, which created a semblance of competition, thus deceiving the clients. In such cases, these are not consortiums in the true sense, but bidding cartels that call themselves consortiums and disguise themselves as such.

5.5 Conclusion

The protection of the competition in the field of public procurement is a priority for ComCo and its Secretariat. Competition contributes to ensuring the efficient use of resources and to increasing economic prosperity. Bid rigging agreements in contrast cause harm to public and private procurement agencies. By consistently taking action against bidding cartels, discussing the issue with procurement offices, raising awareness and developing their screening tool, the competition authorities have in the last ten years made a decisive contribution towards combating bid rigging agreements.